Supreme Court, U.S.
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No. 01-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 2001

JORDAN HOSPITAL, INC.
Petitioner,

v.

DONNA E. SHALALA, in her capacity as Secretary
of the Department of Health and Human Services,
NANCY-ANN MIN DEPARLE, in her capacity as Administrator
of the Health Care Financial Administration, and
the MEDICARE GEOGRAPHIC CLASSIFICATION REVIEW BOARD
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street
Boston, MA 02108
(617) 720-5090

Counsel for Petitioner

2588

QUESTIONS PRESENTED

Jordan Hospital, Inc. ("Jordan") is a participating provider in the Medicare program. The Health Care Financing Administration ("HCFA") failed to gather and publish accurate provider data, which resulted in Jordan's not being able to take advantage of a statutory right to apply for "geographic classification" in fiscal year 2000. The questions presented are:

1. Whether the court of appeals erred in concluding that the district court lacked subject matter jurisdiction where the Complaint alleged a constitutional challenge to the respondents' regulations and procedures.

2. Whether the court of appeals erred in affirming the district court's granting of the motion to dismiss on the grounds that the relief requested by Jordan fell within the statutory ban on judicial review of decisions contained in 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II), where the Complaint constituted a challenge to the validity of the respondents' regulations and procedures rather than a challenge to a particular agency decision.

3. Whether the court of appeals erred in affirming the district court's granting of the motion to dismiss when the district court had subject matter jurisdiction over Jordan's Complaint because respondents may be sued for violating their own rules, regulations, practices and procedures, particularly when such violations resulted in substantial prejudice to Jordan and were properly subject to equitable tolling.

4. Whether the court of appeals erred in affirming the district court's dismissal of the Complaint for lack of subject matter jurisdiction on the grounds that the statutory ban on judicial review of decisions contained in 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II) deprived the court of subject matter jurisdiction where respondents' refusal to consider the application of Jordan for geographic reclassification was not a decision on the merits for which judicial review was foreclosed.

PARTIES TO THE PROCEEDINGS

The Petitioner, Jordan Hospital, Inc., was a plaintiff in the district court and an appellant in the First Circuit Court of Appeals, along with defendants-appellees Donna E. Shalala, in her capacity as Secretary of the Department of Health and Human Services, Nancy-Ann Min Deparle, in her capacity as Administrator of the Health Care Financing Administration, and the Medicare Geographic Classification Review Board.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States of America, Appellant Jordan Hospital, Inc. states that it has no parent corporations and no publicly held company owns ten percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 276 F.3d 72. Appendix (App.) 1a. The district court's Memorandum of Decision was not a published opinion. App. 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on January 10, 2002. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), and jurisdiction in the court of first instance arose under 28 U.S.C. § 1331.

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The relevant constitutional provisions, U.S. CONST. amend. V and U.S. CONST. amend. XIV, § 1, are reproduced in Appendix C at App. 20a. The relevant statutory provisions, 42 U.S.C. § 1254, 42 U.S.C. § 1331, and 42 U.S.C. § 1395ww(d)(10), are reproduced in Appendix C at App. 20a-25a. The relevant regulatory provisions, 42 C.F.R. § 412.230, 42 C.F.R. § 412.278, 60 FR 45778, and 62 FR 45966, are reproduced in Appendix C at App. 25a-42a.

STATEMENT OF THE CASE

This case involves the annual process by which the Secretary of the Department of Health and Human Services ("Secretary") and the Health Care Financing Administration ("HCFA", now the Centers For Medicare and Medicaid Services) set prospective payment rates by which Medicare providers such as Plaintiff Jordan Hospital, Inc. ("Jordan") will be paid for inpatient services in the upcoming fiscal year. HCFA determines these rates based, in part, on a hospital's geographic location, and a hospital, by statute, may apply for and obtain geographic reclassification if certain requirements are met. Reclassification can result in more favorable reimbursement for a hospital.

HCFA improperly denied Jordan its right to geographic reclassification for the fiscal year 2000. In 1998, HCFA published erroneous data that led Jordan to believe that it was not eligible for reclassification for the fiscal year 2000, when, in fact, the hospital was eligible for reclassification. Relying on the erroneous data, Jordan did not seek reclassification for fiscal year 2000. After the application deadline passed, Jordan discovered HCFA's error and submitted an application for reclassification. HCFA denied the application as untimely, even though it had been HCFA's own error that had caused Jordan to not apply within the statutorily prescribed time period. Through this action, HCFA deprived Jordan of an additional $1.8 million in Medicare reimbursement.

Jordan brought this action to seek redress for the deprivation of due process it suffered when HCFA refused to permit it to apply for reclassification after the statutorily deadline. HCFA's failure to gather and publish accurate information deprived Jordan of its right to receive meaningful notice regarding its eligibility for reclassification, and that deprivation, in conjunction with HCFA's steadfast refusal to allow Jordan to file an application subsequent to the hospital's discovery of HCFA's error constitutes a violation of Jordan's due process rights.

Through this action, Jordan is not seeking judicial review of a reclassification decision, which is prohibited by 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II). Rather, Jordan's claim is collateral to the reclassification determination, in that it challenges the constitutionality of the manner in which HCFA has administered the statute.

The relevant facts, in more detail, are as follows. Jordan is a participating provider in the Medicare program. Complaint, ¶11, App. 46a. As such, Jordan receives Medicare reimbursement under the prospective payment system. Id., ¶12, App. 46a. Under this system, reimbursement rates are predetermined based on a number of factors, including the average standardized amount of allowable individual hospital inpatient operating costs and the area wage index applicable to the hospital. Id., ¶13, App. 46a. These factors are based in part on the hospital's geographic location. Id., App. 46a.

To avoid inequities arising from geographic location, a hospital may apply for "reclassification" to another geographic area for the purpose of utilizing that area's standardized amount of operating costs or wage index, or both, in calculating prospective payment rates. Id., ¶14, App. 46a. The criteria for obtaining reclassification of the wage index are set forth in 42 C.F.R. § 412.230(c) and include, *inter alia*, a requirement that the hospital's average hourly wage be at least 108% of the average hourly wage of the hospitals in the area in which the hospital is located and that the hospital's average hourly wage be at least 84% of the average hourly wage of hospitals in the area in which it seeks reclassification. Id., ¶15, App. 47a. Review of whether the

relevant criteria have been satisfied is undertaken by the Medicare Geographic Classification Review Board ("the Board"), an entity established by 42 U.S.C. § 1395ww(d)(10)(A). Complaint, ¶8, App. 45a. An application for reclassification is to be submitted by the first day of the thirteen-month period ending September 30 of the preceding fiscal year. Id., ¶16, App. 47a. Thus, for reclassification applicable to fiscal year 2000, which commenced October 1, 1999, a hospital was required to submit its application for reclassification on or before September 1, 1998. Id., ¶16, App. 47a.

Jordan timely filed and was granted requests for reclassification for the fiscal years 1998 and 1999, resulting in its being reclassified from the Boston, Massachusetts area to the Barnstable-Yarmouth, Massachusetts area. Id., ¶17, App. 47a. Jordan did not file such a request for fiscal year 2000 within the statutorily prescribed time period. Id., ¶20, App. 48a. Jordan's decision not to file was premised on its conclusion, reached after reviewing the hourly wage data published in the July 31, 1998 Federal Register, that it did not qualify for reclassification because its average hourly wage was less than 84% of the Barnstable-Yarmouth area average hourly wage. Id., ¶¶19, 20, App. 48a.

Jordan subsequently learned that Cape Cod Hospital, a Medicare provider located in the Barnstable-Yarmouth, Massachusetts area, had notified its fiscal intermediary of errors in Cape Cod Hospital's 1994, 1995, 1996 and 1997 cost reports, including errors relating to wage data reported for 1995. Id., ¶21, App. 48a. The erroneous data were used to calculate the average hourly wage for the Barnstable-Yarmouth, Massachusetts area for the fiscal year 1999 wage index published by HCFA in the July 31, 1998 Federal Register. Id., ¶21, App. 48a. Jordan was entitled (and, in fact, required) to rely upon the data in determining whether to submit a request for reclassification for fiscal year 2000. Id., App. 48a.

The publication of the erroneous data resulted from HCFA's failure to discharge its obligation to provide Jordan with the accurate information it needed in order to file a timely application for reclassification. Id., ¶¶36-46, App. 51a-55a. One

example of this deficiency involves HCFA's failure to follow its own rules, which required review of the percentage change in the wage index reported by individual hospitals from year to year, with an added level of review and confirmation of the accuracy of the data where the wage data for any hospital produced a change of ten percent or more. Id., ¶40 (*quoting* 60 Fed. Reg. 45778, 45793 (September 1, 1995)), App. 53a. With the erroneous data reported by Cape Cod Hospital, the average hourly wage for the Barnstable-Yarmouth, Massachusetts area rose from $28.72 in fiscal year 1998 to $31.96 in fiscal year 1999, an increase of 11.28%. Complaint, ¶41, App. 53a. Had HCFA followed the prescribed review and confirmation process and fulfilled its obligation to detect and correct erroneous information, the inaccurate data reported by Cape Cod Hospital would have been detected and corrected in a timely manner. Id., ¶42, App. 54a.

The revisions reported by Cape Cod Hospital reduced the average hourly wage for the Barnstable-Yarmouth, Massachusetts area such that Jordan was eligible for reclassification under the 108%-84% criteria. Id., ¶22, App. 48a. Despite the significant impact of these reported revisions, no changes to the fiscal year 1999 wage index for the Barnstable-Yarmouth, Massachusetts area were ever published by HCFA. Id., ¶23, App. 49a. Had the information in the fiscal year 1999 wage index published by HCFA been accurate, Jordan could and would have filed a request for reclassification. Id., ¶24, App. 49a. Jordan would have received approximately $1.8 million more in Medicare program reimbursement had it been reclassified. Id., ¶25, App. 49a.

After learning of the errors in Cape Cod Hospital's cost report, Jordan submitted an Individual Hospital Application for Geographic Reclassification Effective Federal Fiscal Year 2000 ("Application") to the Board. Id., ¶26, App. 49a (attached to Complaint as Exhibit A, App. 58a-70a.) In the Application, Jordan requested reclassification and informed the Board that its application was filed after the normal deadline as a result of the significantly erroneous hourly wage data published in the July 31, 1998 Federal Register. Id., ¶27, App. 50a. On August 24, 1999, one week after the Application was filed, the Board dismissed it on

the grounds that it was untimely, refusing to consider its merits. Id., ¶28, App. 50a (attached to Complaint as Exhibit B, App. 71a.)

Jordan timely filed an appeal of the Board's decision to the Administrator of HCFA reiterating the reason for the post-deadline submission. Id., ¶29, App. 50a (attached to Complaint as Exhibit C, App. 72a-110a.) When that appeal was denied, Jordan submitted a request pursuant to 42 C.F.R. § 412.278(g) to amend the decision, again citing the erroneous data published by HCFA as the basis for the delay in filing. Id., ¶31, App. 50a (attached to Complaint as Exhibit E, App. 115a-146a.) That request was denied on the grounds that the basis provided was insufficient to satisfy the criteria for amending a decision under the regulation. Id., ¶32, App. 51a (attached to Complaint as Exhibit F, App. 147a.)

Jordan filed its Complaint on April 7, 2000, seeking relief on two counts. The first count alleged a violation of Jordan's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In the second count, Jordan sought a declaration that HCFA's rules and regulations relating to the reclassification process were invalid as applied to the present case.

The defendants filed a motion to dismiss on August 18, 2000. That motion was premised on the contention that the district court lacked subject matter jurisdiction to decide the controversy and therefore that dismissal was compelled by Fed. R. Civ. P. 12(b)(1). After hearing, the district court granted the defendants' motion on March 22, 2001. While the district court granted HCFA's Rule 12(b)(1) motion, it also noted in its Memorandum of Decision that the defendants had also argued that even if the district court had subject matter jurisdiction, Jordan's action should be dismissed because Jordan's due process rights were not violated. Memorandum of Decision, App. 17a. The court noted that that issue was not properly within the scope of a motion to dismiss for lack of subject matter jurisdiction. Id., App. 17a.

Jordan appealed the dismissal to the United States Court of Appeals for the First Circuit. In its appeal, Jordan renewed its argument that its procedural due process rights were violated

because it was denied an opportunity to be heard on the merits of its reclassification application.

The First Circuit affirmed the dismissal. See Jordan Hospital, Inc. v. Shalala, 276 F.3d 72, 80 (1st Cir. 2002), App. 13a. Regarding Jordan's constitutional claim, the court stated that "to prevail on its procedural due process claim, Jordan must show both that it had a recognized liberty interest, and was deprived of that interest without adequate notice or a meaningful opportunity to be heard." Id. at 78, App. 9a. The court opined that Jordan did not raise a colorable constitutional claim because, in its view, (1) HCFA's regulatory scheme provided Jordan with sufficient procedural protections, (2) HCFA publication of erroneous data did not deprive Jordan of its rights, (3) Jordan could not have realistically assumed that the wage index information would always be accurate and (4) Cape Cod Hospital, not HCFA, was the party to blame because the hospital reported incorrect data. Id. at 78-79, App. 8a-12a.[1]

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[1] The First Circuit made essentially three separate determinations in its opinion. The court first opined that Jordan was precluded from seeking judicial review of the dismissal of its application for redesignation as a result of the language of 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II), rejecting Jordan's argument that there was a critical difference between "decisions" on the merits and "dismissals" for untimeliness. Id. at 76-77, App. 4a-8a. The court then ruled that Jordan's due process claim was not a colorable constitutional claim. Id. at 78-79, App. 8a-12a. The court finally concluded that equitable tolling was not available to Jordan. Id. at 79-80, App. 10a-12a. This petition focuses on the standard that the circuit court used to cast aside Jordan's due process claim.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND WITH DECISIONS OF UNITED STATES COURTS OF APPEAL

The central issue presented in this petition is whether a federal court may dismiss an otherwise viable federal constitutional claim for lack of subject matter jurisdiction because, in the court's eyes, the claim lacks merit.[2] The First Circuit, believing that it had expansive power to do so, dismissed Jordan's constitutional claim for lack of subject matter jurisdiction, because, in the court's opinion, the claim was not "colorable." Jordan, 276 F.2d at 78, App. 9a. The standard applied by the circuit court, however, conflicts with the standard set out in the decisions of this Court and with the decisions of other circuit courts regarding when a merits issue becomes a jurisdictional one. As a practical matter, in its decision, the First Circuit essentially erased the difference between Federal Rule of Civil Procedure 12(b)(1) motions to dismiss for lack of subject matter jurisdiction and Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted.

In Steel Company, AKA Chicago Steel and Pickling Company v. Citizens For A Better Environment, 523 U.S. 83, 89 (1998), the Court addressed the question of whether the absence of a valid federal cause of action implicates subject matter

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[2] The bar on judicial review of reclassification determinations at 42 U.S.C. § 1395ww(d)(10)(C)(iii)(II) does not, as a threshold matter, apply to Jordan's due process claim, because Jordan is not challenging HCFA's reclassification decision; rather the hospital is challenging what it alleges was the unconstitutional process that produced that decision. See Paluca v. Secretary of Labor, 813 F.2d 524, 526-28 (1st Cir. 1987).

jurisdiction. The Court ruled that this was true only in the most extreme cases, and it set out the following standard:

> [J]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.... Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not invoke a federal controversy.'

Id. (citing Bell v. Hood, 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946) and Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666, 39 E. Ed. 2d 368, 79 S. Ct. 468 (1959)). Steel Company involved a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act ("EPCRA"). Id. at 86. At issue was whether EPCRA allowed suits for purely historical violations of that statute. Id. at 88. The district court, believing that historical violations could not give rise to suit, ruled (1) that the plaintiff had failed to state a claim upon which relief could be granted with respect to the past violations, and (2) that it had no jurisdiction to entertain a suit for a present violation, because the defendant was in compliance with the statute at the time of suit. Id. After a reversal by the Seventh Circuit, the court granted certiorari to resolve a circuit conflict regarding the interpretation of EPCRA. Id. The court ultimately ruled that the lower court had no jurisdiction because the plaintiff had no standing, but in doing so, the court, as noted above, made it clear that the merits issue becomes jurisdictional only in the most extreme cases. Id. at 89, 109-10.

The Court's holding regarding when a merits issue may be treated as jurisdictional was very recently confirmed in Owasso Independent School District No-I-011, AKA Owasso Public

Schools v. Falvo, 122 S. Ct. 934, 938 (2002). In Owasso, a mother of three children brought suit under 42 U.S.C. § 1983 alleging that the practice of peer grading (having other students grade her childrens' papers) violated the Family Educational Rights and Privacy Act ("FERPA"), which prohibits the release of certain student records without parental consent. Id. at 936-37. The Court left open the question of whether FERPA provides private parties with a cause of action under § 1983, and instead analyzed the issue of whether the peer-graded assignments constitute protected educational records under FERPA. Id. at 938. The Court, before analyzing this question, cited the Steel Company decision and ruled that it had subject matter jurisdiction:

> Though we leave open the § 1983 question, the Court has subject-matter jurisdiction because respondent's federal claim is not so 'completely devoid of merit as not to involve a federal controversy.'

Id. Ultimately, the court decided that peer-graded assignments were not protected records under FERPA, but, critically for this petition, the court, following Steel Company, found that federal courts may only consider the merits issue as jurisdictional in those extreme cases in which the federal claim is completely without merit. Id. at 938, 940-41.

The First Circuit did not follow this standard when it dismissed Jordan's constitutional claim. HCFA moved to dismiss solely under Rule 12(b)(1) for lack subject matter jurisdiction. As a result, the First Circuit had before it only the question of whether there was federal subject matter jurisdiction over Jordan's claims, including its constitutional due process claim. Jordan, 276 F.3d at 74, App. 2a. As a result, the court was obligated to apply the standard in Steel Company if it chose to dismiss Jordan's federal

constitutional claim for lack of subject matter jurisdiction solely because it lacked merit.[3]

The First Circuit failed to apply the Steel Company standard, and instead it erroneously analyzed Jordan's claims as if HCFA had brought a Rule 12(b)(6) motion to dismiss, which it had not done. This is manifestly clear from the court's reasoning regarding why Jordan's constitutional claim was subject to dismissal.

The circuit court first stated that to prevail on its procedural due process claim, Jordan had to show both that it had a recognized liberty or property interest, and was deprived of that interest without adequate notice or a meaningful opportunity to be heard. Jordan, 276 F.3d at 78. App. 9a. The court then made it apparent that it would review Jordan's constitutional claim on the merits, pursuant to the standard that applies when a defendant has brought a motion under Rule 12(b)(6) for failure to state a claim:

> Assuming, without deciding that Jordan as a legitimate property interest in receiving reimbursement payments, we must then determine

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[3] As noted above, the district court expressly noted that the question of whether Jordan's constitutional claim stated a claim was not properly within the scope of a Rule 12(b)(1) motion to dismiss. Memorandum of Decision, App. 17a. Despite making this statement, the district court dismissed all of Jordan's claims, including its constitutional claims, without applying the standard set out in Steel Company. Thus, the district court and the appellate court made the identical analytical error in ruling on defendants' 12(b)(1) motion to dismiss. Jordan's claim would have survived had the circuit court applied the Steel Company standard, because, in its complaint, Jordan alleged that HCFA's failure to provide adequate notice to Jordan of its right to apply for reclassification, and HCFA's refusal to consider the merits of Jordan's request for reclassification when it was ultimately filed constituted deprivations of due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, Complaint, ¶46, App. 54a. In addition, because the right of reclassification is a right provided by statute, it constitutes a cognizable property interest, the deprivation of which is sufficient to support subject matter jurisdiction. See Tekkno Labs. v. Perales, 933 F.3d 1093, 1099-1100 (2d Cir. 1991) (Oakes, C.J., concurring) (suggesting that Medicaid provider has a property interest in reimbursement for Medicaid services already performed). Moreover, in considering Jordan's allegations, it is noteworthy that foremost among HCFA's responsibilities with respect to the reclassification process is the furthering of "the fundamental objective in administering the wage index ... to ensure that it is accurate and fair." 62 Fed. Reg. 45966, 45984 (August 29, 1997).

> whether Jordan raises a colorable constitution claim.

Id. (emphasis added). App. 9a. In the First Circuit, the standard against which 12(b)(6) motions to dismiss are judged is as follows:

> Upon considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the district court should not grant the motion unless it appears to a certainty that the plaintiff would be unable to recover under any set of facts.

Roma Construction Company v. Arusso, 96 F.3d 566, 569 (1st Cir. 1996). By stating that it would decide if Jordan's constitutional was "colorable,"[4] the circuit court was clearly using the First Circuit's 12(b)(6) standard to determine if Jordan's due process claim lacked merit to such a degree that the court did not have jurisdiction over it. In so doing, the First Circuit failed to apply the standard set out in Steel Company, because it at no point analyzed whether Jordan's federal constitutional claim was "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to not invoke a federal controversy." Steel Company, 523 U.S. at 89. The court failed to even cite to the Steel Company decision.

After indicating that it would use the 12(b)(6) standard to assess Jordan's constitutional claim on the merits, the circuit court then ruled that the claim was not colorable. Id. at 78-79. App. 8a-12a. Despite the fact that Jordan had alleged that the inaccurate data reported by Cape Cod Hospital would have been detected and corrected in a timely manner if HCFA had followed the prescribed review and confirmation process and fulfilled its obligation to detect and correct erroneous information,[5] the First Circuit opined

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[4] The New Webster's Dictionary and Thesaurus defines "colorable" as "plausible, seeming true." New Webster's Dictionary, 194 (rev. ed. 1992).

[5] Complaint, ¶42, App. 54a.

that the district court had properly rejected Jordan's constitutional claim because, in the court's eyes, (1) HCFA's regulatory scheme provided Jordan with sufficient procedural protections, (2) HCFA publication of erroneous data did not deprive Jordan of its rights, (3) Jordan could not have realistically assumed that the wage index information would always be accurate and (4) Cape Cod Hospital, not HCFA, was the party to blame, because the hospital reported incorrect data. Id. at 78-79, App. 8a-12a. Given Jordan's allegations regarding HCFA's failure to detect and correct the erroneous Cape Cod Hospital data, it is arguable whether the First Circuit even correctly applied the requirement that Jordan's claim not be dismissed unless it appeared to a certainty that Jordan would be unable to recover under any set of facts. See Roma, 96 F.3d at 569. What is not arguable is that the circuit court, in dismissing Jordan's constitutional claim, applied a standard different from the standard set out in Steel Company.

The First Circuit's ruling conflicts directly with the Supreme Court's decisions in Steel Company and Owasso regarding an important federal question, specifically, the scope of federal subject matter jurisdiction. The First Circuit has chosen to dramatically curtail that jurisdiction by ruling that a federal constitutional claim may be dismissed for lack of subject matter jurisdiction if, in a court's eyes, the claim fails to state a claim upon which relief can be granted.

By converting a merits issue into a jurisdictional one, the First Circuit has also rewritten Rule 12(h) of the Federal Rules of Civil Procedure. That rule states that a motion to dismiss for lack of subject matter jurisdiction may be brought at any time, including on appeal, but that a motion to dismiss for failure to state a claim cannot be brought post-trial. Fed. R. Civ. P. 12(h)(2), (3). In its opinion dismissing Jordan's appeal, the First Circuit has changed this rule, because a defendant may now move to dismiss a plaintiff's claim for failure to state a claim at any point, even on appeal, by merely arguing that the reviewing court lacks subject matter jurisdiction, because the claim is not colorable.

By failing to apply the jurisdictional standard set out in Steel Company, the First Circuit's decision in this matter also

conflicts with the decisions in several Courts of Appeals, which either apply the Steel Company standard or a similar standard. See e.g., United States v. Morros, 268 F.3d 695, 699 (9th Cir. 2001) (citing Steel Company and ruling that the district court erred in ruling that subject matter jurisdiction did not exist); Kroll v. Finnerty, 242 F.3d 1359, 1362, 1367 (D.C. Cir. 2001) (finding subject matter dismissal appropriate because alleged basis for federal jurisdiction was "so attenuated and unsubstantial as to be absolutely devoid of merit").

In Lasalle Nat. Trust v. ECM Motor Co., 76 F.3d 140, 141-42 (7th Cir. 1996), the Seventh Circuit, applying a standard similar to that in Steel Company, reversed the district's dismissal for lack of subject matter jurisdiction, and provided a thoughtful and compelling analysis regarding why federal courts should rarely dismiss federal claims for lack of subject matter jurisdiction solely because those claims may lack merit. In Lasalle, which involved a real estate transaction, the buyer brought suit against the seller in federal court under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and under state law to collect certain clean up expenses. Id. at 142. The district court dismissed for lack of subject matter jurisdiction, because it believed that certain contractual language executed by the parties barred plaintiff from bringing any statutory claims. Id.

The Seventh Circuit reversed and remanded. In setting forth its reasoning, the court first noted that it would apply a standard similar to that set out in Steel Company to determine whether the plaintiff's claim warranted dismissal:

> As the Supreme Court noted in Hagans v. Lavine, 415 U.S. 528, [536], 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974), it "has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'"

Id. at 143. The Seventh Circuit stated that such a dismissal would rarely be appropriate, "Through its choice of language, however, the [Supreme] Court has also made clear that only the most extreme cases will fail the jurisdictional test of substantiality." Id.

The Seventh Circuit also found that there were important policy and practical reasons for not dismissing a federal claim for lack of subject matter jurisdiction solely because the claim may not ultimately be successful:

> In some cases, the distinction between a claim that is wholly frivolous for jurisdictional purposes and a claim that is doomed on the merits may seem medieval in its fineness, and may be of little practical importance. Nonetheless, the distinction is one that the Supreme Court has always recognized, and it rests on both sound policy grounds as well as practical considerations. From a policy standpoint, it underscores the importance of giving a full hearing to those who are attempting to raise claims in federal court, even if those claims are eventually unsuccessful. From the more pragmatic side, the way in which the facts are handled under Fed. R. Civ. P. 12(b)(1) differs significantly from the correct approach for purposes of Rule 12(b)(6), and the Rule 12 procedures differ again from those used for Rule 56.

Id. at 144. The court then expanded on the practical reasons why federal courts should rarely invoke lack of subject jurisdiction to, in essence, make a decision that a claim fails to state a claim upon which relief may be granted:

> It is plain that the factual posture of these kinds of pretrial dispositive motions can be critical. In the 12(b)(1) case, the district court is entitled to find

> jurisdictional facts itself; in the 12(b)(6) case, the court is required to keep the case if there is any set of facts under which the plaintiff might prevail, ... and for Rule 56, all disputed material facts must be viewed in the light most favorable to the party opposing the motion, although that party has the burden ... to come forward with evidence showing the genuineness of any factual disputes that it asserts must be tried.

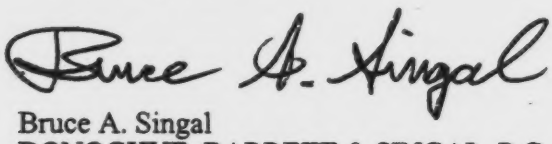
Id. The court then provided the admonition that while the district court must conduct a preliminary inquiry to decide whether a case is nonfrivolous, "this inquiry cannot be a 'doppleganger of the inquiry on the merits.'" Id.

The First Circuit failed to heed this warning. Despite the fact that the only issue before the First Circuit was whether the district court erred in granting HCFA's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the First Circuit conducted a merits inquiry on Jordan's constitutional claim and failed to apply properly the standard set out not only in the Supreme Court's Steel Company decision, but also in the Morros, Kroll and Lasalle decisions noted herein. In sum, by essentially granting a Rule 12(b)(6) dismissal under the guise of Rule 12(b)(1), the court exceeded the scope of the question presented to it and issued an opinion in conflict with the decisions of this Court and several Courts of Appeal.

CONCLUSION

For the reasons stated above, Jordan respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,



Bruce A. Singal
DONOGHUE, BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, Massachusetts 02108
(617) 720-5090

Counsel for Petitioner

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